

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAY 26 1992

Federal Communications Commission
Office of the Secretary

In the Matter of

The Telephone Consumer
Protection Act of 1991

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) CC Docket No 92-90
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REPLY COMMENTS OF THE NYNEX TELEPHONE COMPANIES

NEW YORK TELEPHONE COMPANY and
NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY

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SUMMARY

The NYNEX Telephone Companies (the NTCs) believe that the restrictions on prerecorded or artificial messages contained in proposed §64.1100, and the technical and procedural standards contained in proposed §63.318 are sufficient to protect the privacy interests of residential phone subscribers. If deemed necessary, these restrictions may be supplemented with a notice to consumers regarding measures against unwanted telephone solicitations to be published in white pages directories, and with reasonable time of day restrictions placed on telemarketers.

To the extent the Commission determines additional restrictions are required, the NTCs advise against the alternatives relying on network technologies and special directory markings. Either solution will be of limited effect and may, inconsistent with the Act, pass costs on to residential telephone subscribers in the form of higher rates.

The NYNEX Telephone Companies recommend that the Commission interpret the term "auto dialer" in such a manner as to include only those devices that automatically dial a telephone number and deliver an automated or prerecorded message. Finally, the NTCs agree with the Commission's conclusion that calls by telemarketers to former and existing clientele should be exempted from the proposed regulations.

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COMMENTS OF THE NYNEX TELEPHONE COMPANIES

New England Telephone and Telegraph Company and New York Telephone Company (the NYNEX Telephone Companies or NTCs) hereby submit their comments in response to the Commission's Notice of Proposed Rulemaking (NPRM)¹ initiated, as required by the Telephone Consumer Protection Act of 1991 (TCPA or the Act),² to implement regulations that will restrict the use of automatic telephone dialing systems and telephone facsimile machines for telemarketing purposes.

I. INTRODUCTION

By this Notice of Proposed Rulemaking, the Commission seeks to determine the need for measures to protect residential subscribers from unwanted telephone solicitations and to compare

¹ The Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking, CC Docket No. 92-90, released April 17, 1992.

² Public Law 102-243, amending Title II of the Communications Act of 1934, 47 U.S.C. § 201 et seq.

and evaluate alternative methods to do so. The NYNEX Telephone Companies' comments reflect their dual interests as carriers and telemarketers. These comments attempt to balance the privacy rights of our residential customers and the benefits of telemarketing, while, in accordance with the TCPA, minimizing costs to our subscribers. The NTCs' comments draw from the experience of states within their region to recommend a regulatory approach that balances these interests.

II. TELEPHONE SOLICITATION OF RESIDENTIAL SUBSCRIBERS

Section 227(c)(1) of the Act directs the Commission to initiate a rulemaking proceeding "concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." The NTCs share the concern about potential abuses associated with telemarketing. As carriers, the NTCs sometimes find themselves in the position of the ill-fated messenger -- blamed for the message by their subscribers who may file complaints. However, as the Commission notes, regulations governing telemarketing must balance the subscriber's right to privacy against the benefit of legitimate telemarketing practices. In considering regulations that reconcile these interests, the Commission may find New York's experience with similar regulations useful.

Since 1988, New York has regulated the use of auto dialers with prerecorded announcements.³ By statute, New York requires that, at the beginning of an auto dialer initiated call, the nature of the call and on whose behalf it is being placed be provided. At the end of the call, the address and telephone number of the person on whose behalf the call is being made must be provided. In addition, the auto dialer must disconnect upon termination of the call by either the called or calling party.⁴

In September of 1990, the New York Public Service Commission (NYPSC) instituted a proceeding to solicit comments on the need to adopt additional policies or regulations, or sponsor legislation concerning telemarketing activities. After due consideration it was concluded that

Telemarketing does annoy some telephone consumers, but appears to not represent such an inconvenience as to justify major legislative or regulatory initiatives. There are means available to telephone customers, including using certain approaches in reacting to unwanted telemarketing calls and using the [Direct Marketing Association's] Telephone Preference Service, by which,

³ The New York law uses the term "automatic dialing-announcing devices" which it defines as a device capable of storing and generating numbers to be called or a random or sequential number generator, used to "disseminate a prerecorded message to the telephone number called without the use of an operator." N.Y. Gen. Bus. Law § 399-p (McKinney 1988 & Supp. 1992)

⁴ New York also prohibits unsolicited advertising by use of facsimile machines. See N.Y. Gen. Bus. Law § 396-aa (McKinney 1988 & Supp. 1992.)

at little or no expense, they can reduce the impact of telemarketing.⁵

The Analysis of Comments went on to note that consumers needed to be made aware of existing means to reduce unwanted telemarketing calls.⁶ The NYPSC subsequently ordered that local exchange carriers and NYPSC staff work together to develop consumer education information about telemarketing that advises customers of measures available to lessen the inconvenience of telemarketing calls.⁷ The NYPSC also forwarded to the New York Attorney General the recommendation that the New York legislature consider strengthening its auto dialer restrictions by reducing auto dialed calls to "public safety and health care facilities," by strengthening requirements that telemarketers identify themselves, and by requiring that auto dialers disconnect promptly.

⁵ Analysis of Comments, Case 90-C-0748, filed March 27, 1991 (Analysis of Comments), at 31. Among the alternatives considered and rejected by the NYPSC were a directory asterisk scheme (which the NYPSC deemed to be "ineffective and excessively expensive", *id.*, at 18) and new network technology (which the staff concluded held promise but "will only be of utility in giving customers greater control over telemarketing calls if telemarketers are branded as a distinct group or class of customers; this would be administratively difficult and could be illegal." *Id.* at 23.)).

⁶ Such means include unlisted numbers, using answering machines to screen calls, and requesting placement on the Direct Marketing Association's "do not call" list.

⁷ Final Adoption of White Pages Directory Information Requirements, Case 90-C-0748, effective June 28, 1991 (Final Adoption), at 3.

Thus in calibrating the balance between privacy interests and legitimate telemarketing, New York has determined that it can curb abuse by regulating the use of auto dialed prerecorded announcements (through measures similar to restrictions contained in proposed §64.1100 and §63.318) while notifying consumers that they have the means to advise the telemarketing industry if they wish not to receive telephone solicitations. The NYNEX Telephone Companies endorse this approach and recommend it to the Commission.

Such an approach recognizes that the abuses of telemarketing, while real, are minimal when compared with the benefit they provide. As the Commission notes in the NPRM, in 1991 it received a total of 757 complaints regarding unsolicited telephone calls placed by auto dialers, and 74 complaints generated by live solicitation.⁸ The complaint level is de minimis when contrasted with the tens of millions of telemarketing calls the legislative history indicates are placed each day, and the hundreds of billions of dollars in sales generated annually.⁹

The NYNEX Telephone Companies' experience is consistent with these figures. The NTCs use telemarketing technology to market services. In doing so they are very careful to conduct their telemarketing efforts in a manner that is sensitive to customer needs. Telemarketing representatives are not permitted to pressure a customer in any manner. In

⁸ NPRM at 10, para. 24.

⁹ Id., at 11, para. 25.

fact, if a customer indicates an unwillingness to continue the conversation the telemarketer is instructed to acquiesce at once, thank the customer, and hang up. Moreover the NTCs forbid calls after 9:00 p.m. The record proves that this approach minimizes disrupting subscribers, while providing them with a convenient means to obtain valued services. With 2.1 million calls made in 1990 by New York Telephone, the company received only seven complaints, or approximately one complaint per 300,000 telemarketing calls. By contrast, the 2.1 million calls resulted in approximately 105,000 customers subscribing to the service offered. As these figures reflect, it is in the telemarketer's interest to be sensitive to consumer wishes.

In light of the foregoing, the Commission should recognize that its proposed restriction on the use of auto dialers (§64.1100), including its technical and procedural standard (§63.318), will address practices that have proven the most troublesome to consumers, that is, random or sequential dialing used in association with prerecorded messages by devices that fail to release the call. With this problem resolved, there is little need for any additional regulation governing the telephone solicitation of residential subscribers.

Should the Commission deem it necessary, the NTCs are prepared to support a notice in their white pages directories that would advise consumers about telemarketing activities, and list organizations consumers may contact in order to be placed

on "do not call" lists.¹⁰ Similarly, the NTCs are prepared to support time of day restrictions, provided they are no more restrictive than 9:00 a.m. to 9:00 p.m. as recommended by the Commission.¹¹

These measures are consistent with responsible telemarketing practices and therefore should not impose an undue burden on legitimate telemarketers. Further, telemarketers recognize that it is in their self-interest to maintain a positive relationship with their customers. This incentive to self-police, in conjunction with the Act's contemplated private right of action,¹² and the measures outlined above, should assure that abuses will be curbed, while not placing an undue burden on the telemarketing community or common carriers.

III. REGULATORY ALTERNATIVES TO RESTRICT TELEPHONE SOLICITATION

The Commission has requested comments on several regulatory alternatives being considered to protect residential subscribers from unwanted telephone solicitations. As noted above, the NTCs believe that the rules proposed by the Commission to restrict the use of auto dialers with recorded announcements and to impose technical and procedural standards are sufficient to protect against abusive telemarketing

¹⁰ Indeed, New York Telephone publishes such a notice already.

¹¹ NPRM at 15, para. 33.

¹² §227(c)(5).

practices. However, the NTCs offer the following comments in the event the Commission determines additional safeguards are required.

A. Directory Markings or Network Based Alternatives Are Ineffective and Would Be Inconsistent With The TCPA.

Among the alternative means to address consumer privacy on which the Commission seeks comment are special directory markings and network blocking. Neither is an effective means of protecting consumer privacy. And each would be inconsistent with the TCPA.

1. Special Directory Markings

The NPRM identifies directory markings as a regulatory alternative.¹³ While no details are offered, presumably the Commission envisions a marking, such as an asterisk, that would identify a customer listed in the white pages directory as someone not wishing to receive telephone solicitations. The carrier would be required to gather the information from its subscribers. The Commission asks for a "rigorous cost benefit analysis" of this alternative. In the view of the NYNEX Telephone Companies, directory markings would be ineffective and would generate significant costs.

The New York Public Service Commission considered an asterisk scheme. However, it was concluded that, based on comments submitted, the scheme was "fraught with a number of

¹³ NPRM at 14, para. 31.

legal, administrative and enforcement problems which render [it] ineffective and excessively expensive."¹⁴

In arriving at this conclusion, the NYPSC reviewed the experience of Florida, California and Oregon, as described by commentators. Florida, it was stated, had enacted a law in 1989 requiring that customers be given the option to purchase at \$1.00 per month a marking indicating that the customer did not want to receive sales solicitations. Approximately 7 million customers were eligible for the service; 6,000 signed up. The law was abolished in October, 1990. Commentators also described a directory listings trial conducted in Salem, Oregon. With a one-time fee of \$5 for residence customers and \$10 for business customers, the service attracted a mere 1% of telephone customers in the trial area.

California's experience with special markings was also outlined by commentators. A consumer filed a petition with the California Public Utilities Commission asking that an asterisk be placed in the directory identifying customer interest. A California court upheld the California Commission's finding that "if such designations are used, they should be mandated by law and that, in any event, they would appear to be ineffective and unenforcable because telemarketers use a variety of sources for their marketing lists, and seldom use telephone directory information directly."¹⁵

¹⁴ Analysis of Comments at 18.

¹⁵ Analysis and Comments at 13.

A special directory marking scheme pursuant to the TCPA would overcome the two major flaws that doomed the states' experiments. First, TCPA would be a national requirement, therefore out-of-state telemarketers would be required to consult local directories, rather than intentionally or unintentionally ignore them. Second, to be consistent with the TCPA, resident telephone subscribers should not be charged for identifying their preference. The option of a free preference listing could generate a higher response from consumers.

Despite resolving these flaws, a national, special directory marking requirement remains problematic. Telemarketers create their lists from a variety of sources, and as the California court found, telemarketers seldom use telephone directories directly. Further, there are thousands of directories across the nation. Simply storing, let alone cross-referencing customers' preferences would be an excessive burden on telemarketers, many of whom are small, cottage operations. Thus even a national requirement is not likely to be effective.

Also, special directory marking would be overly broad, denying a consumer the opportunity to distinguish among telemarketers. That is, a consumer may wish to eliminate some categories of calls, but continue to receive information from specialized marketers.

Unlike the state schemes, to be consistent with the TCPA, customers should not have to pay for having their preference listed. This may lead to greater subscriber participation. But to avoid either direct or indirect costs to

the subscriber, recovery will be necessary. The costs -- both direct and hidden -- could be substantial.

To collect and maintain the subscriber information on which the directory markings will be based, carriers would first have to poll subscribers to identify their preference. Pursuant to a Massachusetts Department of Public Utilities (MDPU) order, New England Telephone created and maintains a list of customers who do not want to receive calls from automatic dialing automatic announcing devices (ADADs). This experience is discussed in greater detail below. Of immediate relevance is the cost associated merely with the billing insert to NET's 2.5 million Massachusetts resident customers to determine their preference, which ran approximately \$125,000 for printing and return postage.

Customers wishing not to receive auto dial calls can also be identified during the service order process. However, adjusting the service order process to accommodate the special directory marking would be costly and administratively burdensome. The service order process is highly standardized. It uses the Universal Service Order Codes (USOC) System, administered by Bellcore. Any changes must first be submitted to Bellcore for USOC assignment, a process which can take several months. Internally, the NTCs must reprogram their service order systems which would result in a substantial one-time cost.

The data must then be transferred to the NTCs' directory publisher, NYNEX Information Resources Company (NIRC), which must in turn adjust its programs to recognize

when to insert the asterisk for a cost of approximately \$100,000.00. These, of course, are initial set up costs. While they primarily reflect one-time adjustments for one Regional Bell Operating Company (RBOC), they do not include the substantial costs of updating, revising and storing the lists. In Massachusetts, for example, the estimated annual costs of maintaining the no-call list is approximately \$385,000 (including postage and printing of the annual survey).

The surprisingly high cost of adding a single character to the white pages must also be considered. While a single character may not appear as much, its costs can grow exponentially when the magnitude of data to be modified is considered. NIRC produces approximately 26 million directories per year, carrying approximately 15 million listings. At these numbers, the addition of a single character could consume an additional 400 tons of paper per year.

This substantial increase in paper usage results from the fact that the addition of a single character may cause a one line listing to "run off" and be carried over to a second line. NIRC estimates that a single character indicator, such as an asterisk, would result in run offs that would increase the number of directory pages by approximately 2%. Within the NYNEX region, this translates to approximately 400 tons of paper for an additional annual cost of \$300,000.00. Printing charges would increase by approximately \$125,000.00. Because shipping is weight based, additional costs would be incurred, though by what amount is uncertain.

There are also more deeply hidden costs associated with a special directory marking that should be recognized. Thousands of tons of additional paper will need to be produced and recycled or otherwise disposed. A special marking would also increase customer service costs. Directory listings require strict quality control.¹⁶ Controls to accurately verify the preference of millions of customers would add to already substantial quality control costs. Further, when the telemarketer either inadvertently or intentionally ignores a marking and calls, the customer, having listed her or his preference with the carrier, would undoubtedly complain to the carrier. Carrier personnel would be required to handle these calls, leading to an increase in administrative costs. And in the subscriber's eyes, the carrier will be blamed — a cost to the carrier's reputation and good will.

Further, it has been NIRC's experience that consumers oppose new directory markings. NIRC publishes the Address Telephone Directory, a special directory that lists subscribers by address. NIRC experimented with adding an asterisk to indicate new listings in this special directory. NIRC received numerous complaints from purchasers of the Address Telephone Directory, objecting that the asterisk confused readers and caused eye strain.

¹⁶ Within NYNEX, for example, a mere one per cent error rate could result in a loss of listings the equivalent of the population of Staten Island.

Finally, as the Commission indicates it is unclear how a system dependent on directory listings -- which cover limited geographic areas -- would apply to national telemarketers.¹⁷

In sum, a special directory marking is certain to create significant costs. Its effectiveness, and therefore the offsetting benefit, is doubtful. Further, portions of the cost of a special marking would be difficult to identify. Unless all costs are identified and allocated, they will not be fully recovered. Unrecovered costs may be absorbed by the ratepayer, and thus the directory listings option would be inconsistent the TCPA's mandate that the Act be implemented at no cost to residential telephone subscribers. The NTCs therefore recommend that the Commission not adopt this alternative.

2. Network Technologies

At present, network technology exists that enables subscribers to block unwanted calls. However, this capability is technically limited, not ubiquitous, and only available at an additional charge to the subscriber. Therefore, in the view of the NTCs, it does not present a satisfactory alternative.

Selective Call Rejection is a new service that enables a subscriber to block incoming calls. A subscriber to the service enters the 10 digit telephone number of unwanted callers into a list (similar to a speed dial list) that is stored within the central office switch. Once stored, the switch blocks calls from the listed numbers.

¹⁷ NPRM at 14, para. 31.

The limits of the service's ability to block calls from unwanted telemarketers are obvious. Because the service screens on to the calling party's 10 digit number, the subscriber would have to know, and then enter the number of all telemarketers in order to successfully block such calls. This is clearly impossible. The subscriber has no way of knowing the telephone numbers of the hundreds of thousands of telemarketers that exist across the country. Even if the subscriber did know all the telephone numbers, and were willing to enter each and every one, due to technical limits, a subscriber may enter no more than 31 telephone numbers to be blocked via the service.

Further, subscribers are charged for Selective Call Rejection, therefore reliance on this solution would be inconsistent with the TCPA. If the service were made available at no charge, its costs would have to be rolled into the ratebase, and residential subscribers would still bear the costs of implementing the TCPA.

The NPRM asks for comments on a system that would allow blocking by assigning all telemarketers the same prefix.¹⁸ As the Commission notes, the alternative is problematic, and in fact not feasible. The Stored Program Control switches presently within the network have the ability to block a caller from making outgoing calls to certain central

¹⁸ NPRM at 14, para. 30. The Commission uses the term "prefix." Generally, the telephone industry refers to "central office code" or "NXX," which terms will be used here.

office codes, such as 540 numbers. However, these switches do not have the capacity to block incoming calls based on central office codes.

A central office code reserved for telemarketers could be used in conjunction with Caller ID to provide the subscriber with a level of call screening, but this again is an inadequate solution. Caller ID is a new service that identifies the calling party's number on a small screen. If all telemarketers were assigned the same central office code, and that central office code became universally recognized, the called party could choose not to answer calls displaying the telemarketer central office code.

Caller ID as a means of avoiding unwanted telephone solicitation suffers from technical and regulatory limitations. Caller ID requires Signalling System 7 (SS7), a network signalling technology that is in the process of being deployed. The Caller ID based solution therefore is not available to all subscribers and would only be effective with deployment nationwide. Due to privacy concerns, many state public service commissions have required that per call and/or per line blocking be made available in conjunction with Caller ID. Thus, in the absence of Commission preemption, the Caller ID-based alternative could be defeated by telemarketers. Finally, like Selective Call Rejection, the subscriber is charged for Caller ID service, making the solution incompatible with the TCPA.

Requiring a universal telemarketer central office code may, as noted by the Commission, seriously compromise the North

American Numbering Plan.¹⁹ A central office code-based alternative would require that at least one central office code, designated as an NXX,²⁰ be set aside within each area code, or Numbering Plan Area (NPA). Assignment of an NXX means the 10,000 telephone numbers that can be formed in association with the central office code through combinations of the last four digits would no longer be available. Thus, a nationwide telemarketer central office code would tie up a minimum of 10,000 telephone numbers per NPA. It would remove from use 7,920,000 telephone numbers across the country.²¹ This would be an inefficient use of scarce numbering resources, particularly in light of the limited effectiveness of the blocking capability associated with a national central office code.

B. The NTCs' Experience Indicates Databases Are a Costly and Ineffective Solution.

The TCPA authorizes the establishment and operation of a national database that would contain the telephone numbers of subscribers not wishing to receive telephone solicitations. The NTCs would not object to such a solution provided that,

¹⁹ Id.

²⁰ "N" represents any number from 2-9, and X any number from 0-9.

²¹ 792 NPAs X 10,000 numbers. Concern for the loss of numbers has led the North American Numbering Plan Administrator to recommend the introduction of interchangeable NPAs. As part of an industrywide implementation effort, 792 NPAs will be available after January 1, 1995.

consistent with the Act, if any cost incurred were by a carrier in association with such a database, such costs would be fully recovered from telemarketers. However, based on the experience of New England Telephone, the NTCs recommend against such a solution because it is likely to be costly and ineffective.

To curtail unwanted telephone solicitations, the Massachusetts Department of Public Utilities (MDPU) has ordered New England Telephone to establish and maintain a database of Massachusetts resident subscribers who object to telephone solicitations. Since 1987, when New England Telephone was first required to solicit and maintain the list, only nine telemarketers have purchased the list, which is available for \$300.00.²²

New England Telephone compiled the database through a billing insert that advised its 2.5 million resident customers of the option. Initial costs are estimated to have been in the range of \$500,000. Annual costs to maintain the list are estimated at \$375,000, which figure includes \$50,000 for the insert, return postage of \$75,000, and \$250,000 associated with labor to maintain the list. To date just over 800,000 subscribers, or 31.6% of Massachusetts resident subscribers, have asked to be placed on the list.

Thus in its three years of operation, the Massachusetts program has cost approximately \$1,270,000, which

²² Massachusetts does not penalize telemarketers for soliciting residents who have asked to be placed on the list.

has been offset by a mere \$2,700 from sales of the list to nine telemarketers.

The Massachusetts program differs from TCPA. Unlike the TCPA, the Massachusetts program does not penalize the telemarketer for failure to obtain the list, which may account for the low number of purchases by telemarketers. Also, contrary to TCPA, Massachusetts allows for recovery from the subscriber rate base. However, it is of interest that 70% of subscribers who have had repeated opportunities to request that their numbers be placed on "do not call" lists have not done so. Administration of the lists represents an extraordinary work effort, requiring several thousand hours of labor conducted over months by New England Telephone personnel and contract labor.

IV. THE COMMISSION SHOULD CLARIFY THE DISTINCTION BETWEEN AUTO DIALER CALLS AND LIVE SOLICITATIONS.

Noting that "auto dialer generated calls are more intrusive to the privacy concerns of the called party than live solicitations"²³ the Commission has asked parties to comment on what distinctions should be made between these kinds of calls.²⁴ The NYNEX Telephone Companies believe that the Commission's rules should distinguish among these types of calls, but recommend that the Commission further clarify these distinctions. Specifically, the NTCs are concerned that the

²³ NPRM at 10, para. 25.

²⁴ NPRM at 12, para. 26.

Commission has equated auto dialers with prerecorded or artificial voice systems in this section of the NPRM.

Section 227(a)(1) defines an "automatic telephone dialing system" as equipment that has the capacity

(A) to store or produce numbers to be called, using a random or sequential number generator, and

(B) to dial such numbers.

The definition does not incorporate within it artificial or prerecorded voice capability. However, in Section F of the NPRM, the Commission asks for comments on the "inherent difference in the nuisance factor of auto dialer calls as opposed to live solicitations" implying that auto dialers do not process live solicitations.²⁵

As noted elsewhere in the NPRM, a mechanical dialer may be used to dial customers and immediately deliver answered calls to a live operator. In these cases, the called party is not aware that an auto dialer was used, and perceives the call to be a live solicitation. As recognized by the Commission, mechanically dialing a targeted list of prospects leads to a vastly more efficient use of resources.²⁶ It speeds up dialing, and eliminates slow dials and misdials. These efficiencies result in substantial savings. For example, New England Telephone recently converted from manual dialing to an auto dialer that passes the call to a live operator immediately upon answering. The auto dialer has reduced NET's operating

²⁵ NPRM at 10, para. 23.

²⁶ NPRM at 6, para. 16.

costs associated with telemarketing from \$535,999, for the first quarter of 1991 to \$166,000 for the first quarter of 1992, or a 69% savings. NET received no complaints regarding its telemarketing in either period.

Distinguishing auto dialers used with live operators from auto dialers used with prerecorded or artificial voices is consistent with the TCPA. Section 227 (b)(1)(B), restricting the telephone equipment used to solicit residential customers, as noted by the Commission,²⁷ makes no mention of auto dialers, unlike sections (A), and (D), which expressly prohibit the use of auto dialers. Rather section (B) prohibits the use of an "artificial voice to deliver a message" to residential telephone lines.²⁸ Because section F of the NPRM addresses telephone solicitation of residential subscribers, it would be consistent with the Act not to restrict the use of auto dialers in conjunction with live operators should the Commission conclude regulation of this area necessary.

The Senate Report supports the distinction between two types of call, stating

[I]t is clear that automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a

²⁷ NPRM at 5, para. 13.

²⁸ The NTCs interpret Section 227 (b)(1)(B) to permit the use of auto dialers that deliver live operators to residential customers, and that such telephone calls do not come within the scope of section 227 (b)'s restrictions. The NTCs ask the Commission to confirm this interpretation.

greater invasion of privacy than calls placed by "live" persons.²⁹

New York has recognized the difference between live operators and prerecorded auto dialer-delivered calls; its auto dialer law prohibits only the latter.³⁰

Distinguishing auto dialers used with live operators from auto dialers used with prerecorded or artificial voices is consistent with the purpose of TCPA, that is protecting residential privacy rights, while permitting legitimate telemarketing practices. Auto dialers used in conjunction with live operators merely mechanize the dialing process. Because a live operator comes on immediately, the technology is transparent to the called party. The called party is able to interact with the live operator and, if necessary, express frustration with the call, and disconnect immediately. Thus this means of delivering a telephone call comports with all the distinctions that have led the Commission to observe that live solicitations may inherently be less of a nuisance factor than "auto dialer" calls.³¹

The NTCs ask the Commission to clarify that, consistent with the definition contained in the TCPA, its regulations in this area will be limited to auto dialers used in conjunction with prerecorded or mechanized voices and does

²⁹ Report of the Senate Committee on Commerce, Science and Transportation, Congressional Record, Nov. 26, 1991, H11310.

³⁰ See n. 3, supra.

³¹ NPRM at 10, para. 23.